COURT FILE No.: Toronto Region – College Park
DATE: 2015·06·23

# ONTARIO COURT OF JUSTICE

**BETWEEN:**

**HER MAJESTY THE QUEEN**

**— AND —**

**S[redacted] P[redacted]**

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Before Justice M. Wong
Heard on June 19, 2015
Reasons for Judgment released on Section 276 Application – electronically on June 23, 2015 to be filed in court on July 22, 2015

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**E. Hayden** ........................................ **for the Crown**
**J. Shime** ........................................ **for the accused S[redacted] P[redacted]**

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**Wong, J.:**

**[1]** S[redacted] P[redacted] is charged with one count of aggravated sexual assault. His counsel has brought an application pursuant to s. 276.1 of the *Criminal Code* for an *in camera* hearing under section 276.2 seeking permission to cross examine the complainant on prior sexual acts with persons other than the accused. The Applicant has elected to have a trial, which is scheduled in July 2015 for three days.

**[2]** The Applicant seeks to cross examine the complainant on his previous sexual activity, in particular:

(a) The history of condom use and/or safe sex practices between the complainant and his sexual partners prior to his meeting with the Applicant; and

(b) the history of condom use and/or safe sex practices between the complainant and his sexual partners after he met with the Applicant.

**[3]** As part of disclosure, some of the complainant's medical records were disclosed to the Applicant that indicate the complainant has engaged in sex with other men without condoms, both before and after he had sex with Mr. P[redacted]. It is not disputed that Mr. P[redacted] is HIV positive and one of the issues at the trial is whether the complainant

would have consented to having sexual relations with the Applicant if he had known his HIV status.

Position of the Parties:

[4] The Applicant's first position is that section 276 has no application and that cross examination should be permitted because defence counsel is not intending to question the complainant about the "sexual nature of the activity", but rather for the relevant non-sexual features of the sexual activity. In this case, questions to the complainant about a "pattern of conduct" of the complainant's willingness to assume the risk of exposure to HIV in his sexual life.

[5] In the alternative, the Applicant submits s. 276(3) favours admissibility: counsel submits such evidence is highly relevant to assessing credibility and could raise a reasonable doubt about the complainant's claim that his consent was predicated on Mr. P being HIV-negative. The Applicant argues such evidence is not only highly probative, but necessary for the accused to make full answer and defence against the charge. Counsel submits the only possible way for the Applicant to challenge that anticipated claim is to examine the complainant's prior and subsequent willingness to engage in other sexual activity without a condom to understand his willingness to assume risk. Counsel submits the proposed questions would **not** be asked to show that the complainant is less credible or more likely to have consented.

[6] The crown responds arguing that inquiries into the complainant's history of safe sex practices are inquiries into the complainant's prior sexual activity, which is prohibited under section 276 of the *Code*. As well, the respondent submits that the evidence of the complainant's other sexual activity – before and after the incident relating to the Applicant – is not relevant to any issue at trial.

Summary of the Allegations:

[7] The following is a summary of the allegations:

[8] S P is HIV-positive. The crown alleges that on December 10, 2013, the Applicant and the complainant met in a coffee shop in downtown Toronto. They agreed to have sex and, 20 minutes later, engaged in anal intercourse in the bathroom of the nearby building. Initially the Applicant used a condom. The complainant alleges that the Applicant then asked if he could remove the condom, at which time the complainant asked if he was "if he was okay?" i.e., HIV-positive. According to the complainant, Mr. P said he was, "okay". The complainant then agreed that the Applicant could remove the condom, and the couple continued to have sex. Afterwards they parted company. The complainant alleges the Applicant soon after texted him and advised that he was HIV-positive.

[9] On December 18, 2013, the complainant went to the hospital and during his examination he advised medical staff he had two other unprotected sexual encounters in the previous two months. He was treated with HIV post-exposure prophylaxes, which were

prescribed for the next 28 days. The complainant was also to follow up in two weeks' time.

**[10]** On February 11 and March 18, 2014 as part of his follow-up, the complainant met with doctors. On March 18th, the complainant reported having two more unprotected sexual exposures and doctors cautioned him again about the associated risks.

**[11]** It is agreed that the crown has the burden of proving, *inter alia*, that the complainant would not have consented to the sexual activity had he known the Applicant was HIV-positive.

The Law:

**[12]** Section 276 of the *Code* reads as follows:

Section 276(1) Evidence of complainant's sexual activity

> In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
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> (a) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or;
>
> (b) is less worthy of belief.

Section 276(2) Idem

> In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence
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> (a) is of specific instances of sexual activity;
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> (b) is relevant to an issue at trial; and
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> (c) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

Section 276(3) Factors that judge must consider

> In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
>
> (a) the interests of justice, including the right of the accused to make a full answer and defence;
>
> (b) society's interest in encouraging the reporting of sexual assault offences;
>
> (c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;
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> (d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law; and

(h) any other factor that the judge, provincial court judge or justice considers relevant.

The Twin Myths:

**[13]** Far from being a "blanket exclusion", section 276(1) only prohibits the use of evidence of past sexual activity when it is offered to support two specific, illegitimate inferences. These are known as the "twin myths", namely that the complainant is more likely to have consented or that he is less worthy of belief "by reason of a sexual nature of [the] activity", he once engaged in. The twin myths are not relevant at trial – they are not probative of consent or credibility and can severely distort the trial process (See R.v. *Darrach* [2000] S.C.J. No. 46 at para. 32 and 33).

**[14]** Section 276 applies to all sexual activity, whether with the accused or with someone else. It also applies to non-consensual as well as consensual sexual activity (see *R.v. Crosby,* [1995] 2 S.C.R. 912 at para. 17. Consensual sexual activity can be vitiated by fraud. In the context of the wording of section 265, and accused's failure to disclose that he is HIV-positive is a type of fraud which may vitiate consent to sexual intercourse (see *R.v. Cuerrier* [1998] S.C.J. No. 64 (S.C.C.)

Analysis/Decision Tree:

**[15]** In 2006, Justice Thomas Cromwell prior to his appointment to the Supreme Court in 2008, in a presentation entitled *Evidence of Complainant Sexual Activity*, found on the National Judicial Institute website, provided a helpful s. 276 decision tree from which I have liberally borrowed.

**[16]** Step One: Is the proposed evidence "evidence of sexual reputation"? If the answer is "yes", and the evidence is offered for the purpose of challenging or supporting the credibility of the complainant, then the evidence must be excluded. If the answer is "no", then we move to the next stage. In these proceedings, I accept the evidence does not relate to the sexual reputation of the complainant nor does counsel seek to use the evidence to challenge his credibility, so the answer to the first question is "no".

**[17]** Step Two: Is the evidence "evidence that the complainant has engaged in sexual activity whether with the accused or with any other person"? If the answer is "no", then the usual rules of relevance and admissibility apply. If the answer is "yes", then we move to the next stage. In this case, the evidence relates to sexual activity between the complainant and other men, so the answer is "yes".

**[18]** Step Three: Is the evidence offered to support the inference that "by reason of the sexual nature of that activity, the complainant is more likely to have consented… or

less worthy of belief?" In other words, does the relevance of the evidence solely depend on or derived from one or other of the "twin myths"? If the answer is "yes", then the evidence is excluded. If the answer is "no" then the section 276(2) analysis continues.

**[19]** Counsel for the Applicant emphasizes that he is not asking the Court to infer that the complainant is more likely to have consented or that he is less worthy of belief "by reason of the sexual nature of the activity", he engages in. Jonathan Shime, who is a noted expert in HIV cases, assures the court that he fully embraces the rationale behind the twin myths and is not asking the court to engage in this type of forbidden reasoning. Rather, counsel argues that the evidence of the complainant's prior and past sexual activity is proffered for its non-sexual features, for example, to show a pattern of conduct; namely, "his willingness to assume risk that happens to be in a sexual setting".

**[20]** Indeed the Supreme Court of Canada in *Darrach* at paragraph 35 specifically supports this approach: *the phrase "by reason of the sexual nature of that activity" in s. 276 is a clarification by Parliament that it is inferences from the sexual nature of the activity, as opposed to inferences from other potentially relevant features of the activity, that are prohibited. If evidence of sexual activity is proffered for its non-sexual features, such as to show a pattern of conduct or a prior inconsistent statement, it may be permitted.*

**[21]** Crown counsel, Emma Hayden, argues there is a fine and indiscernible line between "sexual activity" and "non-sexual activity" in this case. Ms. Hayden argues the Applicant is asking the court to find that because the complainant engaged in unprotected sex on other occasions with other men and put himself at risk to HIV exposure and infection then ergo, the complainant would have consented to putting himself at the same risk with Mr. P[redacted] had he known the defendant's true HIV status. Ms. Hayden submits people put themselves at risk at different times in their lives for different reasons; and the prejudicial effect of this type of evidence outweighs its probative value.

**[22]** I am prepared to accept Mr. Shime's submission that the relevance of the complainant's prior sexual conduct is not based on one of the "twin myths", and I see the merit to his argument; however, the court must still carry out the analysis under s. 276(2)(a), (b), and (c).

**[23]** Step Four: Section 276(2)(a): is the evidence of "specific instances of sexual activity?" If the answer is no, then the evidence is excluded. In this case the answer is "yes", there are four known specific instances where the complainant had unprotected sexual activity based on his disclosure to the medical staff. Hence, we go to the next level of inquiry.

**[24]** Section 276(2)(b): is the evidence relevant to an issue at trial? Can the defence articulate a theory of relevance which is plausible in the context of the trial and does not depend on either of the "twin myths? According to Justice Cromwell, this would have to been decided at step 3 in order to advance to this stage.

**[25]** Section 276(2)(c): does the evidence have "significant probative value that is

not substantially outweighed by the danger of prejudice to the proper administration of justice"? In *Darrach*, the court adopted the interpretation of "significant" made at the Court of Appeal level, where Morden A.C.J.O., found that "the evidence is not to be so trifling as to be incapable, in the context of all the evidence, of raising a reasonable doubt". Justice Morden also agreed with *R.v Santocono* (1996), 91 O.A.C. 26 (C.A.) at p.29, where s. 276(2)(c) was interpreted to mean that "it was not necessary for the appellant to demonstrate 'strong and compelling' reasons for admission of the evidence". The requirement of "significant probative value" serves to exclude evidence of trifling relevance that, even though not used to support the two forbidden inferences, would still in endanger the "proper administration of justice".

**[26]** In determining whether evidence is admissible under s.276(3)(2), the judge shall take into account a number of enumerated considerations:

*(a) the interests of justice, including the right of the accused to make a full answer and defence;*

**[27]** Based on the anticipated evidence, I accept the defence counsel's position that it is virtually impossible for him to challenge the complainant's claim that he would not have consented to the sexual activity with Mr. P[redacted] had he known the Applicant was HIV-positive without questioning the complainant about his prior and subsequent willingness to assume risk by having unprotected sex with several partners. Crown counsel Ms. Hayden submits there are other avenues of cross examination open to defence counsel to challenge the witness' position; that to allow questioning would distort the trial process because then we necessarily get into the areas beyond the scope of the trial process; and that the trial then becomes a trial about the choices the complainant has made in his life relating to his sexual partners.

**[28]** I am mindful of the concerns raised by the crown and will aim to minimize the encroachment on the personal and intimate details of the witness' personal life. However, I agree where the privacy interest of the complainant conflicts with the right of Mr. P[redacted] to have a fair trial and to make full answer and defence, the defendant's interests prevail.

*(b) society's interest in encouraging the reporting of sexual assault offences;*

**[29]** I recognize this consideration as well as *(f) the potential prejudice to the complainant's personal dignity and right of privacy,* may be negatively affected if the application to cross examine is granted. However, it is hoped that the limited basis of the cross examination will limit the intrusion on the witness' personal life and not greatly deter others to report offences.

*(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;*

**[30]** I have already commented that in my view there is a reasonable prospect that the evidence will assist this court in arriving at a just determination in the case. The court

will carefully consider what, if any, evidence establishes the complainant's risk-taking and use it only for permissible purposes.

*(d) the need to remove from the fact-finding process any discriminatory belief or bias; and*

*(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;*

**[31]** The concerns expressed in (d) and (e) are less compelling because this is a judge-alone trial.

g) *the right of the complainant and of every individual to personal security and to the full protection and benefit of the law*

**[32]** The challenge of course, is the balancing required between the right of the complainant and others to have the intimate details of their personal lives protected weighed against the right of the accused to make full answer and defence. The cases that both counsel have provided illustrate the challenge that courts have faced trying to determine a fair and proper decision.

**[33]** The crown provided me with three cases:

**[34]** In *R.v. G.A.C.* [2013] O.J. No. 4908 (Ont.Sup.Ct.), the issue before that court was the same as this case. The defendant applied to introduce evidence of a pattern of behaviour with respect to the complainant's sexual practises which showed a willingness to expose himself to the risk of HIV transmission by engaging in unprotected sex with multiple people who HIV status was unknown to him. The application was allowed in part, and the court granted permission to counsel to cross examine on inconsistencies in the witness' statement, but refused permission to allow questioning on the proposed evidence relating to a pattern of behaviour.

**[35]** In *R.v. W.H.* [2015] O.J. No. 2446 (Ont.Sup.Ct.), the application was sought to allow cross examination of two witnesses, one being the complainant, on whether they required each other to wear a condom on the previous occasion they had had sex. The questions related to the complainant's willingness to accept risk on a previous occasion of having unprotected sex with a first-time partner or virtual stranger. The s. 276 application was denied.

**[36]** Lastly, the crown submits the decision of *R.v. Ralph* [2014] O.J. No. 1158 (Ont. Sup.Ct.), where again an application was brought to cross examine two complainants to determine whether they had previously engaged in "high risk sexual behaviour" and to challenge their expected evidence that they would not have engage in sexual intercourse with the defendant had they been aware of his HIV status. In that case, the application was allowed in part and the Applicant's counsel was permitted to ask one question: "before you knew you were HIV-positive, had you ever engaged in sexual intercourse for oral sex with someone who you knew or believed to be HIV-positive?

**[37]** In all three of the crown's cases the courts found that it was not probative to the question of whether the complainant would have consented to sexual activity with the accused had s/he known the person's HIV status simply because they may have engaged in risky sexual behaviour previously.

**[38]** On the other hand, defence counsel provided me with the decision of *R.v. Boone*, 2012 ONSC 441 (Ont. Sup.Ct.), wherein the judge allowed cross examination of the complainants about their text messages regarding sexual encounters with other men, not the accused. The court allowed the application finding that the cross examination related to "non-sexual aspects of the encounters", also noting the evidence was highly relevant and probative.

**[39]** Similarly in *R.v. Pottelberg* (2010) a decision of Justice Bryant of the Superior Court of Justice, allowed cross examination of the complainant's prior unprotected sex acts with others before and after meeting the accused. This case as well as the decision of Justice Mel Green of his court in *R.v. J.H.,* 2012 ONCJ 708 (Ont.C.J.), both dealt with the issue of causation. In these two cases, the complainant(s) had contracted HIV and herpes, respectively. In both cases, cross examination was granted. In *J.H.*, the court also had to address a second issue: whether complainant's sexual activity could establish historical pattern of risk-assumption and thereby raise a reasonable doubt as to whether she would not have consented to having sexual intercourse with the defendant had she first been advised of the fact or jeopardy that he was HIV-positive. Justice Green wrote in his usual comprehensive and insightful way that the evidence may be probative to the issue.

**[40]** Having reviewed the case law, I found the causation cases more straightforward: I confess I find Mr. P[redacted]'s case very challenging.

**[41]** Counsel Mr. Shime has submitted a draft copy of the types of questions he would like to ask the complainant, should the Court grant the s.276 application. Based on the following questions, Mr. Shime argues the Court should be satisfied the purpose of his asking the questions is not for inferences to be drawn "from the nature of the sexual nature of the activity" but rather for the Court to possibly draw inferences on the willingness of the complainant to assume risk that happens to be in a sexual setting:

i) have you engaged in IV drug use including the sharing of needles with others?

ii) Prior to meeting with my client, be tested for HIV. How many times? When? Why?

iii) Prior to meeting Mr. Poisson, how many sexual partners did you have?

iv) With how many of those partners did you engage in sexual activity without a condom?

v) What acts did you engage in without a condom?

vi) After meeting my client, how many sexual partners have you had?

vii) With how many of those partners did you engaged in sexual activity without a condom?

**[42]** Mr. Shime indicated the answers to questions 4 and 6 are the most important for his purposes, and that questions 3 and 5 are not critical, but would put into perspective the answers to questions 4 and 6. In other words, counsel submits that knowing how many sexual partners the complainant had in total, gives some context to the number of partners with whom the complainant opted to have unprotected sex; and thereby, the number of times the complainant was willing to assume a risk in having unprotected sex.

**[43]** Mr. Shime also seeks an order allowing him cross examination of the complainant about whether he advised any of his same-sex partners he had been diagnosed with giardia because he was cautioned by doctors on February 11, 2014 about the risk of transmitting this infection to his sexual partners. Mr. Shime argues that if the complainant did not tell his sexual partners about his infection, then it goes to his state of mind regarding disclosure, knowing that he himself either "lied" or failed to disclose his medical situation then he ought to have questioned more thoroughly and/or been more skeptical with what others told him about their own health.

**[44]** Ms. Hayden for the crown is opposed to the proposed line of questioning except for question 1 relating to the witness' HIV drug use, if any. Crown counsel also argues against defence counsel asking about the complainant's giardia: first, giardia is not necessarily a sexually transmitted disease; second, there was no duty on the complainant to disclose giardia unlike a legal obligation to disclose one's HIV-positive status, and lastly counsel argues lack of relevance.

Conclusion:

**[45]** Defence counsel has not persuaded me that the scope of his cross examination as suggested above is necessary to ensure Mr. P[redacted]'s ability to make full answer and defence. I have difficulty accepting counsel's position that he should be entitled to cross examine the complainant about **all** of his sexual activity with other men both before **and** after his meeting Mr. P[redacted] because it falls under the rubric of "non-sexual aspects" of the activity; because it is limited to whether or not he wore a condom. I agree with the crown that "sexual aspects" and "non-sexual aspects" in this case is difficult to discern. As well, I find to permit the proposed questions and time period simply too broad, which the courts have likened to a "fishing expedition". As well, the farther in time one goes both before and after the event in question, in my view, increases the likelihood of prejudice and diminishes in terms of relevance.

**[46]** For these reasons, I am prepared to grant the application in part and to permit defence counsel to cross examine the complainant on the circumstances he says he engaged in unprotected sexual acts on the two occasions **before** meeting Mr. P[redacted] as well as the two men with whom the complainant engaged in unprotected sexual activity

**after** he met the defendant, as per his medical records. In my view, these four specific instances of sexual activity are sufficiently close in time to the allegation of sexual assault before this court, and depending on the complainant's answers may assist the court in determining whether the crown has proven, *inter alia,* that the complainant would not have consented to the sexual activity with Mr. P[redacted] had he known he was HIV positive. I am also prepared to allow Mr. Shime to question the complainant about whether he disclosed his giardia infection to these four sexual partners only, as it may impact his credibility on whether he ought to have relied on what, if anything, Mr. P[redacted] disclosed to him about his own health.

**[47]** The Applicant will also be permitted to ask question 1 of his proposed questions: Have you engaged in drugs in IV drug use, including sharing of needles with other?

**[48]** Question 2 will be also permitted but with a limitation. Counsel will be permitted to ask "Prior to meeting with my client, you tested test for HIV. How many times? When?" However, counsel will not be allowed to ask "Why" he was seeking HIV testing because this could lead to questions about his past sexual activity.

**[49]** The matter will be adjourned to the trial date of July 22, 2015.

**[50]** Many thanks to counsel for their very able submissions.

**Released: Electronically on consent on June 23, 2015 to be filed with the court on July 22, 2015**

Justice M. Wong